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In the

Supreme Court of the United States

October Term, 1957

No. 677 MISC.

THEODORE THOMAS DeFEBIO, ET AL.,
Appellants

v.

COUNTY SCHOOL BOARD OF
FAIRFAX COUNTY, ET AL.,
Appellees

Appeal from the Supreme Court of Appeals of Virginia

MOTION TO DISMISS APPEAL

and

BRIEF AND APPENDIX OF APPELLEES IN SUPPORT OF THEIR MOTION TO DISMISS

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MOTION TO DISMISS

The appellees respectfully move the Court to dismiss the appeal in the above captioned case upon the ground that such appeal does not present a substantial federal question and that the question presented in this litigation is moot.

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BRIEF OF APPELLEES IN SUPPORT OF THE MOTION TO DISMISS

The appellees, believing the matters herein set forth will demonstrate the lack of substance in the question presented by this appeal, file this statement in opposition to the Jurisdictional Statement of appellants and include their brief in support of their motion to dismiss the appeal.

NATURE OF THE CASE AND PRIOR PROCEEDINGS

The instant case was initiated in the Supreme Court of Appeals of Virginia upon a petition for a writ of mandamus —filed by appellants pursuant to the provisions of Section 88 of the Constitution of Virginia and Sections 8-704 et seq. of the Code of Virginia (1950)—compelling appellees to reinstate infant petitioners in the appropriate public schools of Fairfax County. Appellants in this case (petitioners below) are Theodore Thomas DeFebio and Dominick Nicholas DeFebio, infants who sue by Theo T. DeFebio, their mother and next friend, and Theo T. DeFebio, individually and in her own right. Appellees (respondents below) are the County School Board of Fairfax County, the Division Superintendent of Schools of Fairfax County, the Principals of Mount Vernon High School and Hollin Hall Elementary School of Fairfax County, the President and Members of the State Board of Education and the Superintendent of Public Instruction.

In their petition appellants attacked the validity of the Virginia Pupil Placement Act and contended that the Act violated (1) Section 133 of the Constitution of Virginia and (2) the Fourteenth Amendment to the Constitution of the United States. With respect to these contentions, the Supreme Court of Appeals of Virginia held that the Virginia Pupil Placement Act was not violative of Section 133 of the Constitution of Virginia and that the appellants lacked the

requisite standing to challenge the validity of the act under the Fourteenth Amendment. See, *DeFebio* v. *County School Board*, 199 Va. 511, 100 S. E. (2d) 760.

THE STATUTE INVOLVED

The statute assailed in the Supreme Court of Appeals of Virginia is an enactment of the General Assembly of Virginia which is popularly known as the Virginia Pupil Placement Act. Chapter 70, Acts of Assembly, Extra Session (1956); Sections 22-232.1 through 22-232.16, Code of Virginia (1950) as amended. Particularly pertinent to the federal question sought to be raised by appellants in the Supreme Court of Appeals of Virginia is Section 3 of the Act (Section 22-232.5 of the Virginia Code) which is hereinafter set out in full, together with a brief summary of the remaining provisions of the legislation in question.

Section 1 of the Pupil Placement Act vests all power of enrollment or placement of pupils attending the public schools of Virginia in a Pupil Placement Board, divests all local school boards of such authority and empowers the Pupil Placement Board to promulgate rules and regulations for carrying into effect the provisions of the Act under consideration (Virginia Code, Section 22-232.1).

Section 1a establishes the Pupil Placement Board, composed of three residents of the Commonwealth appointed by the Governor for terms coincident with that of the Governor, and prescribes the compensation to be received by the members of the Board (Virginia Code, Section 22-232.2).

Sections 2 and 2a authorize the Pupil Placement Board to employ agents who may conduct hearings, take testimony and submit recommendations to the Board. It also empowers the Board to make rules and regulations and prescribes forms for the conducting of such hearings and for

the facilitation of the performance of the duties imposed upon the Board and its agents (Virginia Code, Sections 22-232.3 and 22-232.4).

Section 3 of the Pupil Placement Act prescribes:

> "The Pupil Placement Board in enrolling each pupil in a school in each school district shall take into consideration:
>
> "(1) The effect of the enrollment on the welfare and best interests of such child and all other children in said school as well as the effect on the *efficiency of the operation* of said school.
>
> "(2) The health of the child as compared to other children in the school.
>
> "(3) The effect of any disparity between the physical and mental ages of any child to be enrolled especially when contrasted with the average physical and mental ages of the group with which the child might be placed.
>
> "(4) Availability of facilities.
>
> "(5) The aptitude of the child.
>
> "(6) Availability of transportation.
>
> "(7) The sociological, psychological, and like intangible social scientific factors as will prevent, as nearly as possible, a condition of socioeconomic class consciousness among the pupils.
>
> "(8) Such other relevant matters as may be pertinent to the *efficient operation of the schools* or indicate a clear and present danger to the public peace and tranquility affecting the safety or welfare of the citizens of such school district." (Virginia Code, Section 22-232.5) (Italics supplied)

Section 4 provides that pupils who have attended a public school prior to the effective date of the Act and who have

not moved from their localities shall continue in attendance at the school last attended, until graduation therefrom or unless enrolled, for good cause shown, in another school by the Pupil Placement Board (Virginia Code, Section 22-232.6).

Section 5 of the Act declares that any child who desires to enter a public school for the first time following the effective date of the Act, who is graduated from one school to another within a school division, who transfers to a school division, or who desires to enter a public school after the opening of a school session shall make application to and be enrolled by the Pupil Placement Board, the application to be made on behalf of the child by his parent, guardian or other person having custody of such child (Virginia Code, Section 22-232.7).

Section 6 of the Act establishes the procedure whereby parents or guardians of a pupil assigned to a public school may protest any action of the Pupil Placement Board. This section makes provision for the holding of hearings, the publication of notices, the filing by the Board of a written decision including findings of fact and the intervention in such proceedings of specified interested parties (Virginia Code, Section 22-232.8).

Section 6a of the Act makes provision for a review of the decision of the Pupil Placement Board by the Governor and prescribes the procedure governing such review (Virginia Code, Section 22-232.9).

Section 7 provides for a further review of the decision of the Governor by the circuit court of the county or corporation court of the city in which the party requesting such judicial review resides, while Section 7a provides for the intervention of interested parties (Code of Virginia, Sections 22-232.10 and 22-232.11).

Section 8 of the Act provides for the notification of the

Pupil Placement Board of the pendency of the cause by the clerk of the court in which a petition for review is filed, the publication of notices and the procedure for maturing the proceedings (Virginia Code, Section 22-232.12).

Section 9 of the Act prescribes that the findings of fact of the Pupil Placement Board shall be considered final if supported by substantial evidence on the record, while Section 10 establishes an appeal of right to the Supreme Court of Appeals of Virginia by any party aggrieved by a final order of the court of first instance (Virginia Code, Sections 22-232.13 and 22-232.14).

Section 10a provides for the procurement of an injunction by any interested party for the purpose of restraining the performance of any act, or any intended or threatened act, which may be in violation of the provisions of the Pupil Placement Act, while Section 11 immunizes the Pupil Placement Board and its agents against charges of libel, slander or insulting words, civil or criminal, based upon any statement made during any proceedings or deliberations contemplated by the Act (Virginia Code, Sections 22-232.15 and 22-232.16).

STATEMENT OF THE CASE

On January 22, 1957, the infant petitioners, Theodore Thomas DeFebio and Dominick Nicholas DeFebio, members of the Caucasian race, were permitted by the County School Board of Fairfax County to attend, on a temporary basis subject to official enrollment by the Pupil Placement Board, Mount Vernon High School and Hollin Hall Elementary School, respectively, both of which institutions are public schools located in Fairfax County, Virginia, in which county the infant petitioners have resided since January 19, 1957.

During the months of March and April, 1957, petitioner Theo T. DeFebio, mother of the infant petitioners, was requested by various school officials of Fairfax County to execute on behalf of each of the infant petitioners Application for Placement of Pupil forms prescribed by the Pupil Placement Board pursuant to the authority conferred upon it by the Virginia Pupil Placement Act, Chapter 70, Acts of Assembly, Extra Session (1956), page 74; Section 22-232.1, *et seq.*, Code of Virginia (1950) as amended. When Mrs. DeFebio refused to comply with these requests, she was informed by the local school authorities that the rules and regulations of the Pupil Placement Board forbade the continued attendance in the public schools of any child whose parent, guardian or other custodian refused to complete and file the specified Application for Placement of Pupil form, and she was advised that, unless such forms were executed on behalf of the infant petitioners, it would be necessary to discontinue the attendance of infant petitioners in the public schools of Fairfax County.

Notwithstanding, Mrs. DeFebio persisted in her refusal to complete and file the forms in question. Thereafter, in accordance with the rules and regulations of the Pupil Placement Board, the permission to attend the public schools of Fairfax County on a temporary basis, originally granted to Theodore Thomas DeFebio and Dominick DeFebio, was terminated on or about April 18, 1957, and April 11, 1957, respectively, and infant petitioners were not permitted to attend such public schools during the remainder of the school term ending June 14, 1957. This action by the local school authorities was occasioned solely by reason of the continued refusal of Mrs. DeFebio to complete and file Application for Placement of Pupil forms prescribed by the Pupil Placement Board.

QUESTIONS PRESENTED

1. Did appellants possess the requisite standing to challenge the validity of the Virginia Pupil Placement Act under the Fourteenth Amendment?

2. Has the question presented in this litigation become moot?

ARGUMENT

I.

The Appellants Lack the Requisite Standing to Challenge the Validity of the Virginia Pupil Placement Act Under the Fourteenth Amendment

It is manifest from the factual statements adopted by both appellants and appellees that the instant case arose solely because of Mrs. DeFebio's persistent refusal to execute, on behalf of her children, application for placement of pupil forms prescribed by the Pupil Placement Board pursuant to the authority conferred upon the Board by the Virginia Pupil Placement Act. Appellants are members of the Caucasian race and infant appellants had been permitted by the local school authorities of Fairfax County to attend—on a temporary basis subject to official enrollment by the Pupil Placement Board—schools located in Fairfax County, which institutions were then attended only by pupils of the same racial inheritance as appellants. The temporary permission granted by the local school authorities was withdrawn when Mrs. DeFebio refused to execute and file applications for the official enrollment of infant appellants. Appellants have not and do not now contend that the DeFebio children were ever denied admission, on account of their race, to any school which the State maintains.

In this setting, the Supreme Court of Appeals of Virginia observed (199 Va. at 513, 100 S. E. (2d) at 762):

". . . Petitioners are members of the Caucasian race, and the mother desires her children to attend schools in which only the members of that race are enrolled. *The issue here is quite narrow. It involves no broad constitutional question of racial discrimination.* The only issue presented is whether, as a prerequisite to the admission of her children to the public schools, Mrs. DeFebio may be required to execute an application in which the only information sought is: (1) Name; address, date of birth, sex, condition of health, physical or mental disabilities, and particular aptitudes of the child; (2) name and address of school the child last attended, his grade and years in school, and (3) name and location of any school in Virginia in which any other child of applicant is enrolled.

"There is nothing in such requirement that violates any of petitioners' constitutional or other legal rights. Indeed, the information sought could have been required by the school authorities without a specific act of the General Assembly. *There is nothing in the record tending to show that the enforcement of the statute as to the petitioners will result in the children being denied admission to any school which they may be entitled to attend, or that they will thereby be required to attend any school to which they should not be admitted.*

"It is a fundamental principle of constitutional law, firmly supported by both Federal and State authorities, that a person who challenges the constitutionality of a state statute has the burden of proving that he himself has been injured or is threatened with injury by its enforcement. *In other words, a person whose rights are not infringed by enforcement of a state statute can not successfully attack its constitutionality.* It avails him nothing to point out that some other person might conceivably be discriminated against. One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitu-

tional feature injures him.' *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226, 227, 56 S. Ct. 754, 755, 80 L. ed. 1155; *Barrows* v. *Jackson*, 346 U. S. 249, 73 S. Ct. 1031, 97 L. ed. 1586; *Morgan* v. *Commonwealth*, 168 Va. 731, 191 S. E. 791, 111 A. L. R. 62; *Grosso* v. *Commonwealth*, 177 Va. 830, 13 S. E. 2d 285; *Bailey* v. *Anderson*, 182 Va. 70, 27 S. E. 2d 914; *Avery* v. *Beale*, 195 Va. 690, 80 S. E. 2d 584; 11 Am. Jur., Constitutional Law, Sec. 111 *et seq.*, p. 748 *et seq.*; 16 C. J. S., Constitutional Law, Sec. 76 *et seq.*, p. 226 *et seq.*" (Italics supplied)

Supportive of the "fundamental principle of constitutional law" enunciated by the Supreme Court of Appeals of Virginia is a host of decisions, both State and Federal, which are too numerous and uniform to justify extension of the authorities cited by the Court. It is significant to note, however, that the view expressed by the Supreme Court of Appeals of Virginia in the case at bar was initially foreshadowed and ultimately adopted by the United States District Court for the Eastern District of Virginia in *Joel Klein et al.* v. *School Board of the City of Falls Church et al.* (D. C. E. D. Va.), Civil No. 1586, a contemporary case factually identical to that here under consideration.

In the *Klein* case, *supra*, the plaintiffs, father and son, instituted proceedings in the District Court seeking a preliminary and temporary injunction restraining defendants, the local school board and division superintendent of schools, from requiring the execution and submission of an application for placement of pupil form on behalf of the infant plaintiff as a condition to his entry and continued education in the local public schools. Plaintiffs were members of the Caucasian race, the infant plaintiff had attended the local public schools from the time of his enrollment in the first grade in 1951 and infant plaintiff was eligible to enter the

local Junior-High School. As in the case at bar, plaintiffs were informed that unless the prescribed application for placement of pupil form was executed, infant plaintiff could not be enrolled in the local Junior-High School for the school year beginning September, 1957. See, Amended Complaint, *post*, Appendix B.

After hearing, the plaintiffs' motion for a preliminary injunction was denied by the District Court. During the course of his ruling on such motion, Judge Bryan observed (see, Findings of Fact and Conclusions of Law, *post*, Appendix C):

> "It is an entirely different case when the plaintiff is denied admission to a school, a school to which he would rightfully be entitled to enter, but is denied the right on the basis of race or color. *There is no question here of denial of admission to the school on the basis of race or color. No issue of that sort is involved here.* Where this Court has directed the admission of Negro pupils to a Negro school, which has not initially been the school of his choice, it has done so by consent of the parties, but in those instances the student was denied the right to enter the school of his choice, or the school to which he would be entitled to go, absent the doctrine of segregation.
>
> *"Today we have purely an issue of the validity of the law as between persons of the same race, and, as I have said before, no irreparable injury has been shown to be in the offing for this student by allowing this pupil placement law to stand in effect because he can sign under protest.*
>
> * * *
>
> "When this Court knows that that very question is before the state court, comity between the courts requires that this Court stay its hand until the decision is rendered by the state court. I emphasize that because

> of the two outstanding circumstances here that I have reiterated already. *One is that there is no aspect of irreparable injury, and the second is that there is no controversy here raising a peculiarly Federal question because it is not a contest on the basis of race or color.*" (Italics supplied)

Subsequently, the defendants filed an amended answer to the amended complaint, in which answer defendants admitted plaintiffs' allegations of fact. Thereafter, both parties moved for summary judgment in accordance with Rule 56(c) of the Federal Rules of Civil Procedure. Denying plaintiffs' motion for summary judgment and granting that of the defendants, the Court observed (see, Ruling of the Court, *post*, Appendix D):

> "Constitutional rights are personal rights. Just as the Supreme Court of Appeals of Virginia said in the *DeFebio* case, an act of a parliamentary body may be invalid or unconstitutional as to one person and not as to another.
>
> "The person not affected, whose rights are not impinged, cannot be heard to complain; and that is the second ground on which this motion for summary judgment on behalf of the defendant must be sustained."

Manifestly, the *Klein* case and the case at bar are factually identical. Moreover, both cases posed the same legal question, i.e., the standing of plaintiffs to challenge the constitutionality of the Virginia Pupil Placement Act under the Fourteenth Amendment when no issue of racial discrimination was involved, and this question was resolved adversely to plaintiffs in both cases upon the same decisional authority.

The cases upon which appellants rely to avoid the conclusive effect of the "fundamental principle of constitutional law" enunciated by the District Court and the Supreme Court of Appeals of Virginia contain nothing at variance with the decisions in the *Klein* case and the case at bar. In *Barrows* v. *Jackson*, 346 U. S. 249, 97 L. Ed. 1586, the petitioners, Caucasians, instituted suit against respondent, also a Caucasian, for breach of a racial restrictive covenant entered into by the parties as owners of residential real estate in the same neighborhood. Petitioners alleged that respondent broke the covenant by conveying her real estate without incorporating the restrictive covenant in the conveyance and *by permitting non-Caucasians to move in and occupy the premises.* Recognizing the principle that ordinarily one may not claim standing to vindicate the constitutional rights of third parties and that one may not challenge the constitutionality of a statute unless he can show that he is within the class of those whose constitutional rights are allegedly infringed, the Court nevertheless pointed out (346 U. S. at 257, 259, 97 L. Ed. at 1596, 1597):

> "This is a salutary rule, the validity of which we reaffirm. But in the instant case, we are faced with a *unique situation* in which it is the action of the state *court* which might result in a denial of constitutional rights *and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court.* Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed *by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.*
>
> * * *
>
> "The law will permit respondent to resist any effort

to compel her to observe such a covenant, so widely condemned by the courts, *since she is the one in whose charge and keeping reposes the power to continue to use her property to discriminate or to discontinue such use.*

* * *

"In the present case, it is *not* non-Caucasians as a group whose rights are asserted by respondent, but the rights of *particular non-Caucasian would-be users* of restricted land." (Italics partially supplied)

Clearly no such "unique situation" characterized by "peculiar circumstances" exists in the present case. In view of the number of instances in which Negro plaintiffs have instituted legal proceedings to protect their constitutional rights from infringement by operation of the Virginia Pupil Placement Act, it is obviously neither difficult nor impossible for those individuals—whose rights appellants allegedly seek to vindicate in this case—to present their grievances before the courts. See, e.g., *Adkins* v. *School Board of the City of Newport News*, 148 F. Supp. 430, *aff'd.* 4 Cir., 246 F. (2d) 325, *cert. den.* 2 L. Ed. (2d) 63; *Calloway* v. *Farley* (D. C. E. D. Va.), Civil No. 2616; *Walden* v. *Farley* (D. C. E. D. Va.), Civil No. 2550; *Estes* v. *Farley* (D. C. E. D. Va.), Civil No. 2551; *Jordon* v. *Farley* (D. C. E. D. Va.), Civil No. 2552. Moreover, appellants are not the individuals "in whose charge and keeping reposes the power" to continue or discontinue discriminaton in the public schools. Finally, in the *Barrows* case, respondent was permitted to assert the rights of "particular non-Caucasian would-be users" of the restricted land in question, not the rights of non-Caucasians as a group, as appellants attempt in the instant case.

In *Brewer* v. *Hoxie School District No. 46*, 238 F. (2d) 91, various local school officials instituted proceedings in the

federal district court to obtain an injunction restraining defendants from obstructing the operation of the local schools on an integrated basis. In support of their standing to maintain these proceedings, the officials in question contended that they were under a constitutional duty to support and obey the Fourteenth Amendment and to accord equal protection of the law in the operation of schools, and that *they* had a federal right to be free from wrongful interference in the performance of that duty. Sustaining this contention, the United States Court of Appeals for the Eighth Circuit declared (238 F. (2d) at 98, 99):

> "The plaintiffs being bound by constitutionally imposed duty and their oaths of office to support the Fourteenth Amendment and to accord equal protection of the laws to all persons in their operation of the Hoxie schools must be deemed to have a right, which is a federal right, to be free from direct interference in the performance of that duty.
>
> * * *
>
> "Plaintiffs are under a duty to obey the Constitution. Const. Art. VI, cl. 2. They are bound by oath or affirmation to support it and are mindful of their obligation. It follows as a necessary corollary that they have a federal right to be free from direct and deliberate interference with the performance of the constitutionally imposed duty. The right arises by necessary implication from the imposition of the duty as clearly as though it had been specifically stated in the Constitution."

In addition to asserting their own federal right, the school authorities also contended that the "identity of interest" between the school authorities and the school children was "sufficiently close" to permit the school authorities to assert the rights of the pupils and that the school board

stood, in effect, in *loco parentis* of the pupils whose rights were at stake if defendants' illegal conduct succeeded in coercing the school board to discontinue operation of the schools upon an integrated basis. Sustaining this contention, the Court observed (238 F. (2d) at 104):

> "The school board having the duty to afford the children the equal protection of the law has the correlative right, as has been pointed out, to protection in performance of its function. Its right is thus *intimately identified* with the right of the children themselves. The right does not arise solely from the interest of the parties concerned, but from the necessity of the government itself. Cf. Ex parte Yarbrough, 110 U. S. 651, 662, 4 S. Ct. 152, 28 L. Ed. 274. Though, generally speaking, the right to equal protection is a personal right of individuals, this is 'only a rule of practice', Barrows v. Jackson, 346 U. S. 249, 257, 73 S. Ct. 1031, 1035, 97 L. Ed. 1586, which will not be followed where the *identity of interest* between the party asserting the right and the party in whose favor the right directly exists is *sufficiently close.*" (Italics supplied)

Of the same general import are the decisions of this Court in *Pierce* v. *Society of Sisters*, 268 U. S. 510, 69 L. Ed. 1070, and *Truax* v. *Raich*, 239 U. S. 33, 60 L. Ed. 131. In the former case, private educational organizations, whose business and properties were threatened with destruction by the operation of a State statute requiring education of children exclusively in public schools, were held to have an interest in present and prospective patrons of their institutions sufficient to permit the organizations to challenge the validity of the statute regulating the right of parents to control the education of their children. In the latter case, an alien employee whose livelihood was threatened by the operation of a State statute limiting the employment of

aliens, was held to have an interest in his employer's freedom to select employees sufficient to enable the employee to challenge the validity of a statute infringing that freedom.

It is obvious that the critical element in the disposition of the above mentioned cases was the close relationship between the individual challenging the validity of the statute and the individual whose rights were directly affected, a relationship deemed "sufficiently close" to cause the interest of the one to be "intimately identified" with the interest of the other. Cf., *Brewer* v. *Hoxie School District*, *supra*, at 104. In the *Barrows* case, the relationship was that of vendor and vendee, in the *Brewer* case that of school board and pupils, in the *Pierce* case that of private school organizations and present or prospective patrons of such organizations and in the *Truax* case that of employer and employee. In contrast to the relationships under consideration in those cases, it is clear that the interests of the appellants in the instant case are not even distantly related to those of the class whose rights might be affected by the operation of the Virginia statute—much less to any particular individual of that class—and that there is no similarity, much less identity, of interest between the appellants and those whose rights they seek to assert. On the contrary, it is manifest that appellants in the case at bar seek to acquire a vicarious standing from unknown, unidentified and unidentifiable individuals, to whose interests those of the appellants are not even tangentially associated, in contravention of the fundamental principle of constitutional law elaborated by the Supreme Court of Appeals of Virginia.

Of no greater substance is the contention that the mother of the infant appellants is being made an involuntary party to State action designed to maintain a racially segregated public school system. Not only does this contention assume the correctness of appellants construction of the Virginia

Pupil Placement Act—a construction upon which the Supreme Court of Appeals of Virginia expressed no opinion, and which has been rendered meaningless by the subsequent statutory amendment discussed in Argument II of this brief—but, even assuming the correctness of appellants construction, no rights of the appellants are thereby infringed. In this connection, it is significant to note that a similar contention was made on behalf of the infant plaintiff's parent in the *Klein* case, *supra*, and resolved adversely to such parent by the District Court. See, Amended Complaint, paragraph 14, *post*, Appendix B.

II.

The Question Presented by This Litigation Has Become Moot

Counsel for the appellees submit that the instant appeal should be dismissed not only for want of a substantial federal question but also because the question sought to be presented by this appeal is now moot, appellants' anticipatory protestations to the contrary notwithstanding. A casual reading of appellants' brief in the Supreme Court of Appeals of Virginia will reveal that the sole ground of their attack upon the Virginia Pupil Placement Act was embodied in the contention that the phrases "efficiency of the operation" of the public schools and the "efficient operation" of such schools, appearing in Section 3 of the Virginia Pupil Placement Act,* was intended to mean racially segregated schools and that the Pupil Placement Board was obligated, under what appellants term the "efficient rule standard" to assign pupils to the public schools of Virginia on a racially segregated basis. See, Brief of Petitioner, pp. 23, 24, 25. This was the whole of appellants contention before the Supreme Court of Appeals of Virginia, and the phrases in question

*Section 22-232.5 of the Virginia Code, set out in full, ante, p. 4.

constituted the single, isolated focal point of appellants' assault upon the Pupil Placement Act under the Fourteenth Amendment.

This ground of attack is no longer available to appellants. At the 1958 regular session of the General Assembly of Virginia, Section 3 of the Virginia Pupil Placement Act was amended and re-enacted. In its amended form, effective June 27, 1958, the provision in question provides:

> "The Pupil Placement Board shall enroll each pupil in a school in each school district so as to provide for the orderly administration of such public schools, the competent instruction of the pupils enrolled and the health, safety and general welfare of such pupils."

In light of this subsequent legislative action, it is clear that the construction which appellants urged the Supreme Court of Appeals of Virginia to accord the Virginia Pupil Placement Act—and upon which appellants sole claim of unconstitutionality rested—is now, in effect, totally without statutory foundation. The language upon which appellants entire case rests is, for all practical purposes, no longer a part of the Virginia Pupil Placement Act, and the statutory provision challenged by appellants in the Supreme Court of Appeals of Virginia will not be applicable with respect to the enrollment of pupils for the school term commencing September, 1958. It is thus clear that the conflicting contentions of appellants and appellees with respect to the appropriate interpretation to be accorded the challenged provisions of Section 3 of the Virginia Pupil Placement Act now poses a purely academic question—concerning which there can be no present clash of contending legal rights—and that the issue presented by this litigation has become moot.

CONCLUSION

For the foregoing reasons, appellees submit that the question sought to be presented by the instant appeal is so lacking in substance as to obviate further consideration, and that the question of the interpretation and constitutional validity of the Virginia Pupil Placement Act sought to be raised by appellants in the Supreme Court of Appeals of Virginia is now moot.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

THEODORE THOMAS DEFEBIO, an Infant, &c., et al.

v.

THE COUNTY SCHOOL BOARD OF FAIRFAX COUNTY, et al.

December 2, 1957.

Record No. 4753.

Present, All the Justices

HUDGINS, C. J., delivered the opinion of the court.

[1] On January 19, 1957, Theo T. DeFebio and her two children, Theodore Thomas DeFebio, 14 years of age, and Dominick Nicholas DeFebio, 9 years of age, became residents of Fairfax county, Virginia. Subsequently, on the request of the mother, her two sons were permitted by local school authorities to attend, on a temporary basis subject to being officially assigned by the Pupil Placement Board, public schools in Fairfax county. The older son was admitted to the Mount Vernon High School and the other son to the Hollin Hall Elementary School. Despite repeated requests made by the school authorities, Mrs. DeFebio refused to execute and file for her sons "application for placement of pupil" forms as required by Chapter 70, Acts of Assembly, Extra Session (1956), Code, §§22-232.1, *et seq.*. Because of this refusal permission for the two children to attend the named schools was withdrawn.

Thereafter, Mrs. DeFebio and her two sons filed in this Court a petition for a writ of mandamus praying that the

County School Board of Fairfax County, the Division Superintendent of Schools of Fairfax County, the Principals of Mount Vernon High School and Hollin Hall Elementary School of Fairfax County, the President and Members of the State Board of Education and the Superintendent of Public Instruction be compelled to reinstate the two children in the schools, notwithstanding Mrs. DeFebio's refusal to execute the application for placement of pupil.

Petitioners contend that § 133 of the Virginia Constitution vests the power of enrollment or placement of pupils in public schools exclusively in local school boards, and that the legislature is thereby prohibited from vesting such power in the Pupil Placement Board or any other body.

The legislature functions under no grant of power. It is the supreme law making body of the Commonwealth, and has the inherent power to enact any law not in conflict with, or prohibited by, the State or Federal Constitutions. Section 133 of the Virginia Constitution, while vesting "supervision" of public schools in local school boards, does not define the powers and duties involved in that supervision. The general power to supervise does not necessarily include the right to designate the individuals over whom supervision is to be exercised. If the legislature deems it advisable to vest the power of enrollment or placement of pupils in an authority other than the local school boards, it may do so without depriving such local school boards of any express or implied constitutional power of supervision.

[2] Petitioners' second contention is that their rights under the Fourteenth Amendment to the Constitution of the United States are infringed by the requirement that the parent execute and file the application for placement of pupil forms. In support of this contention, they cite numerous federal cases on integration of public schools, including

Brown v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. ed 873, 38 A. L. R. 2d 1180, 349 U. S. 294, 75 S. Ct. 753, 99 L. ed 1083; *Atkins* v. *School Board of Newport News*, 148 F. Supp. 430, *aff'd*, 4 Cir., 246 F. 2d 325, *cert. den.*, ... U. S. ....., 78 S. Ct. 83, 2 L. ed. 2d 63.

None of these authorities is relevant to, or determinative of, the issue presented by the facts in this case. Petitioners are members of the Caucasian race, and the mother desires her children to attend schools in which only the members of that race are enrolled. The issue here is quite narrow. It involves no broad constitutional question of racial discrimination. The only issue presented is whether, as a prerequisite to the admission of her children to the public schools, Mrs. DeFebio may be required to execute an application in which the only information sought is: (1) Name, address, date of birth, sex, condition of health, physical or mental disabilities, and particular aptitudes of the child; (2) name and address of school the child last attended, his grade and years in school, and (3) name and location of any school in Virginia in which any other child of applicant is enrolled.

There is nothing in such requirement that violates any of petitioners' constitutional or other legal rights. Indeed, the information sought could have been required by the school authorities without a specific act of the General Assembly. There is nothing in the record tending to show that the enforcement of the statute as to the petitioners will result in the children being denied admission to any school which they may be entitled to attend, or that they will thereby be required to attend any school to which they should not be admitted.

[3] It is a fundamental principle of constitutional law, firmly supported by both Federal and State authorities, that a person who challenges the constitutionality of a state statute has the burden of proving that he himself has been

injured or is threatened with injury by its enforcement. In other words, a person whose rights are not infringed by enforcement of a state statute can not successfully attack its constitutionality. It avails him nothing to point out that some other person might conceivably be discriminated against. "One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him." *Premier-Pabst Sales Co. v. Grosscup*, 298 U. S. 226, 227, 56 S. Ct. 754, 755, 80 L. ed. 1155; *Barrows v. Jackson*, 346 U. S. 249, 73 S. Ct. 1031, 97 L. ed. 1586; *Morgan v. Commonwealth*, 168 Va. 731, 191 S. E. 791, 111 A. L. R. 62; *Grosso v. Commonwealth*, 177 Va. 830, 13 S. E. 2d 285; *Bailey v. Anderson*, 182 Va. 70, 27 S. E. 2d 914; *Avery v. Beale*, 195 Va. 690, 80 S. E. 2d 584; 11 Am. Jur., Constitutional Law, § 111 *et seq.*, p. 748 *et seq.*; 16 C. J. S., Constitutional Law, § 76 *et seq.*, p. 226 *et seq.*

For the reasons stated the writ of mandamus must be denied.

Writ denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 1586

JOEL KLEIN, an Infant, by SAMUEL C. KLEIN,
His Father and Next Friend,
and
SAMUEL C. KLEIN, Individually, 435 Hampton Court
Falls Church, Virginia,

Plaintiffs,

v.

SCHOOL BOARD OF THE CITY OF FALLS CHURCH,
and
IRVIN H. SCHMITT, Division Superintendent,
City of Falls Church, Virginia,

Defendants.

AMENDED COMPLAINT

* * *

2. The infant plaintiff, Joel Klein, is a white citizen of the United States, and of the Commonwealth of Virginia, and is a resident of, and domiciled in, the City of Falls Church, Virginia. He is within the statutory age limit of eligibility to attend the public schools of said city, and has attended said schools since the first grade in 1951. He is now eligible to enter a Junior High School of said city. Said infant plaintiff brings this suit by his father and next friend, Samuel C. Klein.

3. Plaintiff, Samuel C. Klein, is a citizen of the United States and of the Commonwealth of Virginia, and is a resident of, and domiciled in, the City of Falls Church, Virginia.

He is the father of the infant plaintiff, Joel Klein, and as such, has the custody and control of said infant. He sues on behalf of the infant plaintiff and individually in his own behalf.

4. Defendant, Irvin H. Schmitt, is Division Superintendent of Schools of the City of Falls Church, Virginia. As such, he is under the authority, supervision and control of the orders, policies and practices of the defendant, School Board of the City of Falls Church, Virginia. He is sued here in his official capacity.

5. The defendant, the School Board of the City of Falls Church, Virginia, exists pursuant to the laws of the Commonwealth of Virginia, to supervise the operations of the City Schools in accordance with the Constitution of Virginia, Article IX, Section 133.

* * *

7. On or about June 21, 1956, plaintiff, Samuel C. Klein, received a letter from the defendant, Irvin H. Schmitt, advising that unless he signed a pupil placement application his son, Joel Klein, would not be permitted to enroll in Junior Senior High School in September.

* * *

11. Defendants justify their refusal to permit infant plaintiff to attend school on the ground that they are required, under the pupil placement act of Virginia (1956 Acts Extra Session, Chapter 70) to exclude all students whose parents or guardians refused to sign a pupil placement application, that the laws of the Federal Courts [illegible] the Richmond, Arlington and Charlottesville [illegible] in establishing the racial [illegible] Virginia Supreme Court of Appeals [illegible] pupil placement laws.

* * *

13. Plaintiffs further allege that the infant, Joel Klein, by being classified by defendants for assignment to school on a purely arbitrary basis, namely by race or color, with the logical resulting injury to his state of emotional and mental health, is being deprived of due process of law contrary to the Fourteenth Amendment of the Constitution of the United States; and that the pupil placement form, under the pupil placement act, is the instrument by which this unconstitutional deprivation of rights is being effected.

14. The plaintiff, Samuel C. Klein, alleges that he is being deprived of his rights to due process of law, under the Fourteenth Amendment to the Constitution, in that defendants are attempting to force him to participate with them in a conspiracy to maintain segregation in the public schools of the City of Falls Church, in circumvention of the supreme law of the land, and to violate the oath to uphold the Constitution of the United States by attempting to force him to sign a pupil placement form thereby assenting to a compulsive racially segregated school in said city, under the threatened penalty of possible prosecution for violation of his obligation to send his son to school in compliance with the laws of the Commonwealth of Virginia.

Wherefore, in view of the irreparable harm being done to the infant plaintiff, Joel Klein, by reason of the denial by defendants of his right to attend school on a non-segregated basis and on the basis of a non-discriminatory and non-arbitrary admission procedure, which denial is brought about and maintained by the application of the pupil placement form under the pupil placement act, and in view of the possibility of prosecution of the plaintiff, Samuel C. Klein, under the compulsory school attendance law, unless he assents to a racially segregated school in said city by signing the pupil placement form, plaintiffs respectfully pray that

preliminary and permanent injunction be entered by the court as follows:

1. Restraining and enjoining the defendants, and each of them, their successors in office and their agents and employees, forthwith from enforcing against said plaintiff, Samuel C. Klein, any requirement that the said plaintiff execute and submit a pupil placement form as a condition to the entry and continued education of the infant, Joel Klein, into school in the City of Falls Church, Virginia.

* * *

3. That the defendants be enjoined from refusing and denying the right of the plaintiff, Joel Klein, to obtain an education at the Junior High School level, except upon submission of a pupil placement form.

* * *

.....

Samuel C. Klein, Individually

.....

Joel Klein, by his father and next friend, Samuel C. Klein

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 1586

JOEL KLEIN, et al.,
Plaintiffs,

v.

SCHOOL BOARD OF FALLS CHURCH, et al.,
Defendants.

Before
United States District Judge
Hon. Albert V. Bryan
October 11, 1957

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Stated from the Bench At Closing of Argument)

THE COURT: Gentlemen, I think this motion can be decided without passing on any of the constitutional questions that have been pressed here. It must be remembered that this is a motion for a preliminary injunction. It is fundamental, or hornbook law that, as you all know, a preliminary injunction can be granted only to prevent irreparable injury pending the suit. It is a determination made before the Court hears the case on its merits. Unless and until the Court is shown that irreparable injury will result —unless the status quo be maintained—why, the applicant is not entitled to an interlocutory or preliminary injunction.

The plaintiff here shows absolutely no case of irreparable injury. The plaintiff does not show the possibility of irreparable injury, much less the probability. The plaintiff student here has now, and always has had, the right to enter

the very school of his choice. He can do so without waiving, or surrendering in the slightest degree, any of his legal or conscientious objections. That applies also to the parent plaintiff in the case. He simply accomplishes this by signing the pupil placement form under protest.

This is a state statute and the form is a state regulation, and the final word on the meaning of that state statute, aside from its constitutionality, is in the state court. What the state court says a state statute means is conclusive on the Federal Court. The highest court in the State of Virginia under the state system is the Supreme Court of Appeals, and it has unequivocally said that anyone signing the pupil placement form under protest, or without recourse so to speak, does so without prejudice whatsoever. That is the final word on the subject, so we may accept that to its full extent.

The plaintiff here, or plaintiffs, would not be harmed in any way. They would not surrender any right by signing it. Consequently, he had the right, without hindrance, to enter this school.

It is an entirely different case when the plaintiff is denied admission to a school, a school to which he would rightfully be entitled to enter, but is denied the right on the basis of race or color. There is no question here of denial of admission to the school on the basis of race or color. No issue of that sort is involved here. Where this Court has directed the admission of Negro pupils to a Negro school, which has not initially been the school of his choice, it has done so by consent of the parties, but in those instances the student was denied the right to enter the school of his choice, or the school to which he would be entitled to go, absent the doctrine of segregation.

Today we have purely an issue of the validity of the law as between persons of the same race, and, as I have said

before, no irreparable injury has been shown to be in the offing for this student by allowing this pupil placement law to stand in effect because he can sign under protest.

When we find that there is no proof of irreparable injury, then the right to a preliminary injunction falls. Setting aside a state statute is not to be lightly done, and, really, we have here an academic question presented to the Court, when injury is not incipient, and the Court should not pass upon the validity of any law, particularly a state statute, unless there is substantial interest at stake.

Moreover, the Court thinks that a decision in this case should await a trial of the case on the merits. There are a lot of factual issues that would arise on a plenary trial of the case, and with the possibility of irreparable injury out of the case, there is no reason why the Court should not postpone a decision of the case until it has heard the case on its merits.

Again, the very question that is now tendered by this motion is before, or has been before, the Supreme Court of Appeals of Virginia. That Court has held that there is no occasion for a suspension or stay of this law pending the litigation, so that we have precedent for denying a preliminary stay in this case. But, further than that, this case, when tried on the merits, will involve the validity of the Pupil Placement Act. When this Court knows that that very question is before the state court, comity between the courts requires that this Court stay its hand until the decision is rendered by the state court. I emphasize that because of the two outstanding circumstances here that I have reiterated already. One is that there is no aspect of irreparable injury, and the second is that there is no controversy here raising a peculiarly Federal question because it is not a contest on the basis of race or color. With those two factors out of the way, the Court seems compelled by the doctrines

of comity to await the decision of the Supreme Court of Appeals of Virginia on the subject.

The Court will deny the motion for a preliminary injunction without prejudice to the rights of the plaintiffs to proceed with their case on the merits, and will require an answer to be filed to the complaint within twenty days.

The Court will adopt this statement as its findings of fact and conclusions of law and thereon will enter a decree in accordance with the same.

.....
United States District Judge

October ...., 1957.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil No. 1586

JOEL KLEIN, et al,

Plaintiffs,

v.

SCHOOL BOARD OF THE CITY OF FALLS CHURCH, et al,

Defendants.

Post Office Building
Alexandria, Virginia
Tuesday, January 21, 1958

Before: The Honorable Albert V. Bryan

RULING OF THE COURT

THE COURT: This case is a classic illustration of confusion in the understanding of underlying principles of decision in the school segregation cases. The burden of the complaint here is that the plaintiff pupil is prejudiced because the acts of the General Assembly of Virginia deny him an integrated school.

The Constitution of the United States, as construed by the Supreme Court in the *Brown* case, does not guarantee a citizen an integrated school. Other factors being equal, the court has said that it is unconstitutional to deny a pupil entry into a school because of his race or color; but there has never been any mandate from the Supreme Court that the pupils must be mixed.

That court has only said that each student must be placed on the same basis, regardless of race or color, when he is in the same circumstances. It has never said, in any deci-

sion with which I am familiar, that there must be a creation of integration.

The school authorities are not required to compose a student body of students of different races. They are forbidden from preventing such a composition, if each of the students is in the same circumstance save race or color.

That is the thesis and fundamental basis of the decisions in the segregation cases.

Now put another way, the complaint here is that the present plaintiffs are prejudiced because Negroes are not permitted to enter the school open to the plaintiff pupil here. Well, that is not a deprivation of any right of the plaintiff pupil. No right is taken from him on account of race or color.

The persons that could complain there are the persons who are excluded from that school although they possess the same qualifications and have the same circumstances surrounding them as other students; but they differ upon the ground of race or color. That is their complaint.

That complaint cannot be adopted by someone who is not the subject of that deprivation.

Constitutional rights are personal rights. Just as the Supreme Court of Appeals of Virginia said in the *DeFebio* case, an act of a parliamentary body may be invalid or unconstitutional as to one person and not as to another.

The person not affected, whose rights are not impinged, cannot be heard to complain; and that is the second ground on which this motion for summary judgment on behalf of the defendant must be sustained.

For these reasons, the Court will deny the motion of the plaintiffs for summary judgment; will grant the motion of the defendants for summary judgment and will direct the Clerk to enter a judgment dismissing the complaint, with costs to be taxed in favor of the defendants.